Syarikat Macey Bhd v Nightingale Allied Services (sued as a firm) & Ors

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24–397–1994
JAMES FOONG J
19 DECEMBER 1994

Contract *— Formation — Terms — Whether imposition of condition precedent amounted to counter-offer — Whether fundamental points agreed upon — Whether court can import reasonable terms in areas not agreed upon to make agreement effective*

Land Law *— Malay reservations — Land held by non-Malay — Whether land a Malay holding under s 2 of the Malay Reservation Enactment — Whether transfer to non-Malay requires approval of Ruler-in-Council — Malay Reservation Enactment (FMS Cap 142) ss 2, 6(vi) & 8*

The applicant ('Macey') entered into negotiations with the second respondent, Metroplex Development Sdn Bhd ('Metroplex'), for the sale and purchase of an estate ('the land') owned by Macey. The letter of offer from Macey included terms regarding the purchase of the land as a going concern requiring the purchaser to take over the estate workers and the time for payment of the purchase price. Metroplex discovered that some of the titles of the land were endorsed as Malay reservation land and insisted that the removal of the endorsements be a condition precedent suggested certain changes to the time for payment of the purchase price. Macey argued that the land did not fall within the definition of 'Malay holdings' under s 2 of the Malay Reservation Enactment (FMS Cap 142) ('the Enactment') and, as such, the approval of the Ruler-in-Council under s 8 of the Enactment was not necessary. Macey also refused to accept the deposit contending that no agreement had been reached between the parties. Metroplex and the third respondent, as a partner of the first respondent real estate agency involved in the deal, immediately lodged caveats against the land claiming that since the fundamentals of the contract such as the parties, the property and the price had been agreed upon, there was a concluded contract and the court could infer reasonable terms into the contract in the areas not agreed upon. Macey filed this application seeking, inter alia, a declaration that there was no concluded contract.

Held, allowing the application:

(1) There had been no complete acceptance of all the terms contained in Macey's offer. Metroplex had left in abeyance the issues regarding the taking over of the estate workers and the time for the payment of the purchase price and had instead raised the Malay reservation issue. This subject matter was a new term which had to be agreed upon by the parties.

(2) When land in a Malay reservation area is registered in the name of a non-Malay prior to the creation of the Malay reservation, the non-Malay can transfer or charge the land to any non-Malay without the approval of the Ruler-in-Council. Since the land had never been registered in the name of any Malay proprietor, the endorsement on the titles under s 6(vi) of the Enactment was erroneous.

(3) The matters relating to the parties, the property and the price might represent fundamentals in a contract but, within these and arising from these, were many equally important and essential terms that had to be agreed upon before an agreement could be conclusive. The insistance on the removal of the endorsements on the titles as a condition precedent was a major term which had to be agreed upon by the parties. Since Macey had rejected this term, there was no concluded contract. The court could not import reasonable terms in order to make the agreement effective as the fundamental question relating to the title of the land and the time for payment had not been agreed upon.

[Bahasa Malaysia summary

Pemohon ('Macey') telah berunding dengan responden kedua, Metroplex Development Sdn Bhd ('Metroplex'), untuk jualbeli sebidang tanah estet ('tanah itu') yang dipunyai oleh Macey. Surat tawaran daripada Macey merangkumi terma dan syarat berkenaan dengan pembelian tanah itu sebagai sebuah estet yang berjalan di mana pembeli diperlukan mengambil alih pekerja-pekerja estet dan tempoh pembayaran harga pembelian. Metroplex telah mendapat tahu bahawa sebahagian daripada hakmilik tanah itu telah diendorskan sebagai tanah rizab Melayu dan mendesak supaya pembatalan pengendorsan tersebut dijadikan suatu syarat terdahulu dan mencadangkan beberapa perubahan kepada tempoh pembayaran harga pembelian. Macey membantah bahawa tanah itu tidak termasuk dalam definisi 'pemegangan Melayu' di bawah s 2 Enakmen Rizab Melayu (NMB Bab 142) ('Enakmen itu') dan, dengan itu, kebenaran daripada Raja dalam Mesyuarat di bawah s 8 Enakmen itu tidak perlu diperolehi. Macey juga enggan menerima pembayaran deposit dan menegaskan bahawa tidak terdapat suatu perjanjian yang dicapai di antara pihak-pihak yang terlibat. Metroplex dan responden ketiga, sebagai rakan kongsi responden pertama yang merupakan agensi hartanah yang terlibat dalam urusan itu, dengan segera mencatatkan kaveat ke atas tanah itu dengan mendakwa bahawa memandangkan terma asasi kontrak tersebut seperti pihak-pihak terlibat, hartanah dan harga telah dipersetujui, terdapat suatu kontrak yang mengikat dan mahkamah boleh membuat inferens tentang terma yang munasabah ke dalam kontrak itu bagi bahagian yang belum dipersetujui. Macey memfailkan permohonan ini untuk memohon, antara lain, suatu deklarasi bahawa tidak terdapat kontrak yang tercapai.

Diputuskan, membenarkan permohonan itu:

(1) Tidak terdapat penerimaan sebenar atas semua terma yang terkandung di dalam tawaran Macey. Metroplex telah membiarkan isu-isu mengenai pengambilan alih pekerja estet dan tempoh pembayaran harga pembelian begitu saja dan sebaliknya telah menimbulkan isu rizab Melayu itu. Perkara ini adalah suatu terma baru yang perlu dipersetujui oleh pihak-pihak terlibat.

(2) Apabila tanah di dalam kawasan rizab Melayu didaftar atas nama seseorang bukan Melayu sebelum pewujudan rizab Melayu itu, orang bukan Melayu itu boleh memindahmilik atau menggadai tanah itu kepada orang yang bukan Melayu tanpa memperolehi kebenaran Raja dalam Mesyuarat. Memandangkan tanah itu tidak pernah didaftar atas nama tuan punya Melayu, pengendorsan atas hakmilik tersebut di bawah s 6(vi) Enakmen itu adalah suatu kesilapan.

(3) Perkara-perkara mengenai pihak-pihak terlibat, hartanah dan harga mungkin merupakan terma asasi dalam sesuatu kontrak tetapi, di dalam dan muncul daripada perkara-perkara ini, terdapat banyak lagi terma yang sama penting dan perlu yang harus dipersetujui sebelum sesuatu perjanjian boleh diikat. Pendesakan supaya pembatalan endorsmen atas hakmilik itu dijadikan sebagai suatu syarat terdahulu adalah suatu terma yang penting yang perlu dipersetujui olehg pihak-pihak yang terlibat. Memandangkan Macey telah menolak terma ini, tidak terdapat kontrak yang terikat. Mahkamah tidak boleh mengimport terma yang munasabah supaya menjadikan perjanjian itu berkesan oleh kerana soal asasi mengenai hakmilik tanah itu dan tempoh pembayaran, masih belum dipersetujui.]

Notes

For cases on the formation of contracts, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1561–1600.

For cases on Malay reservation land, see 8 *Mallal's Digest* (4th Ed) paras 1529–1546; [1990] Mallal's Digest 770.

Cases referred to

Lim Keng Siong & Anor v Yeo Ah Tee [1983] 2 MLJ 39 (distd)

SMIM (Malaysia) Sdn Bhd v Sanyo Murako International Co Ltd [1992] 1 AMR 42 (distd)

Tan Hong Chit v Lim Kin Wan [1964] MLJ 113 (folld)

Legislation referred to

Malay Reservation Enactment (FMS Cap 142) ss 2, 6(vi), 8

Kelantan Malay Reservation Land Enactment 1930

Edward Kam and *Manjit Singh* (*Kam Woon Wah & Co*) for the plaintiff. A
YM Sin (*Othman Hashim & Co*) for the first and third defendants.
Jean Chong (*Soo Thien Ming & Shahrizat*) for the second defendant.

James Foong J: The applicants are or were the registered owners of a plantation known as Sg Tamu Estate which consists of approximately 800 B
acres of land, held under 13 documents of title (for ease of reference, this court shall refer to this 800 acres of land as 'the said land').

On 3 February 1992, the applicants indicated to the third respondent, a partner in the first respondents' firm which were engaged in the real estate agency business, that the applicants intended to sell the said land. C
The first respondents replied stating that they had a potential purchaser. Consequent to this, the applicants through their solicitors M/s Shearn Delamore & Co ('M/s Shearn Delamore' in short) wrote to the first respondents setting out the terms of offer for the sale of the said land. For the purpose of clarity, this court shall refer to this letter of offer as P8. As the terms in P8 are important for the determination of the issues of this D
case, this court hereby reproduces its exact contents.

19 October 1992

Nightingale Allied Services
Real Estate Agents
No 5, Jalan 5/8 E
56000 Petaling Jaya

Dear Sirs

Re: Sale of Sg Tamu Estate, Batang Kali, Selangor
Comprising of about 800 acres F

We act for Syarikat Macey Bhd and write with reference to the offer made by your clients for the purchase of our clients' property abovementioned.

We have now instructions to reply to you as follows:

Our clients are prepared to sell the above property at the price of Ringgit thirty thousand (RM30,000) per acre subject to the following terms G
and conditions:

(1) Sale of the property as a going concern and therefore the purchaser will have to, inter alia, take over the workers employed in the estate. Our clients will not be responsible for any compensation/termination benefits, etc.

(2) The sale and purchase is subject to the approval of our clients' H
shareholders at an extraordinary general meeting to be held and the Foreign Investment Committee of the Prime Minister's Department ('FIC').

(3) Ten per cent (10%) is payable on the signing of the sale and purchase agreement which sum will be refunded free of interest if the approvals I
mentioned in (2) above are not obtained within a period to be fixed.

(4) Balance of the purchase price is to be paid within a period of six (6) months or one (1) month of receipt of the FIC approval, whichever is the later but extension for a further period of six (6) months will be granted if requested by the purchaser subject to the purchaser paying ten per cent (10%) interest on the balance purchase price.

(5) The other usual terms and conditions applicable to sale of estates.

Our clients are agreeable to a commission of two per cent (2%) to be paid as follows:

(a) upon receipt of the approvals mentioned in item (2) above, two per cent (2%) of the ten per cent (10%) received by our clients as deposit; and

(b) upon payment of the balance sum, two per cent (2%) will be paid to you.

Please confirm that the terms above stated are acceptable to your client and let us have particulars of your clients so that the necessary sale and purchase agreement can be drafted.

Yours faithfully
Shearn Delamore

On 10 November 1992, a firm of solicitors M/s Soo Thien Ming & Shahrizat ('M/s Soo Thien Ming' in short) acting for and on behalf of the second respondents, wrote to M/s Shearn Delamore informing them that their clients were the intending purchasers of the said land. In this letter, it was expressed that the purchase price of RM30,000 per acre was agreeable and so were conditions 2 and 3 of M/s Shearn Delamore's letter. However, relating to the payment of the balance of the purchase price, M/s Soo Thien Ming asserted that, through the third respondent, the applicants had agreed to a period of 12 months instead of six. Further, in respect of condition 1 which relates to the taking over of the estate workers employed in the said plantation, M/s Soo Thien Ming expressed that they were obtaining instructions from their clients and would revert at a later date. Subsequent to this letter, M/s Soo Thien Ming forwarded a draft agreement (hereinafter referred to as 'the first draft agreement') to M/s Shearn Delamore which did not include any terms relating to the taking over of the estate workers. But inserted into this draft agreement was the clause relating to the payment of the balance of the purchase price to be 12 months instead of six.

Soon after the first draft agreement, on 25 November 1992, M/s Soo Thien Ming wrote to M/s Shearn Delamore informing them that their search at the relevant land registry had revealed that on nine of the 13 titles, there was a memorial which expressed 'Malay reservation'. The said solicitors were of the view that with this endorsement, transfer of the said land to their clients may not have been possible; nevertheless, they sought clarification.

On 8 December 1992, M/s Soo Thien Ming by letter proposed to M/s Shearn Delamore that in view of the Malay reservation endorsement on the nine titles, the terms of the draft agreement should be changed. They suggested that:

(a) the removal of this endorsement should be a condition precedent;

(b) the deposit of 10% of the purchase price be paid to M/s Shearn Delamore as stakeholder instead of the applicants until the endorsement was removed; and

(c) before completion of the sale, the condition precedent must be satisfied.

Again receiving no positive response from M/s Shearn Delamore except that of 'still awaiting instructions', M/s Soo Thien Ming forwarded another draft agreement (hereinafter referred to as 'the second draft agreement') to the applicants' solicitors. In this second draft agreement, besides making the removal of the endorsement of Malay reservation a condition precedent, it also required the applicants to obtain a declaration to revoke the endorsement by the Menteri Besar, which declaration must be approved by the Ruler-in-Council of the state, and that such a declaration must be gazetted before the balance of the purchase price was to be paid, and which payment shall only be made within six months after the last of the above conditions were fulfilled.

On 5 March 1993, M/s Soo Thien Ming informed M/s Shearn Delamore that they had received RM2.4m from the second respondents, and as the applicants' solicitors refused to accept it, the same was banked into M/s Soo Thien Ming's clients' account.

On 8 March 1993, M/s Shearn Delamore replied to M/s Soo Thien Ming, putting on record that there had been no offer and acceptance reached between the parties. They further elaborated that since all the terms and conditions in P8 were not accepted by the second respondents or their solicitors, the proposed terms contained in M/s Soo Thien Ming's letters to them were considered as counter-offers by the second respondents, on which they were taking their clients' instructions.

On 17 and 18 May 1993, caveats were placed on the said land by the second respondents.

Besides this, the third respondent also placed a caveat on one of the titles of the said land bearing Grant No 37147, Lot 6374, Mukim of Batang Kali, District of Ulu Selangor, Selangor.

On 2 August 1993, M/s Shearn Delamore wrote to M/s Soo Thien Ming a rather short letter. In it they stated that their clients, the applicants, 'are prepared to consider the offer of RM35,000 an acre for the purchase of the above property'. This drew a massive protest from M/s Soo Thien Ming as was evidenced from their letter dated 12 August 1993. After some heated exchange of letters between the said solicitors, M/s Shearn Delamore finally wrote on 5 November 1993 to M/s Soo Thien Ming stating that, 'we are now instructed by our client that they are prepared to proceed with their original offer on the terms and conditions set out in their letter of 19 October 1992 [P8]'.

This seems to have pacified all relevant parties, but unfortunately not for long. On 20 November 1993, M/s Soo Thien Ming by letter formally accepted the applicants' above offer but once again raised the endorsement of Malay reservation on the documents of title to the said land. They now proposed either:

(a) the removal of this endorsement as a condition precedent; or

(b) a covenant on the applicants' part to apply to the court to rectify the register of title by deleting this endorsement on the ground that it was erroneously entered.

Together with this letter, another draft agreement (hereinafter referred to as 'the third draft agreement') was attached.

On 10 January 1994, M/s Shearn Delamore on behalf of the applicants commented on the third draft agreement. Primarily, it insisted that:

(a) the said land be sold without vacant possession since the estate workers were still residing thereon;

(b) the purchasers should only be the second respondents (this arose in the third draft agreement where the second respondents attempted to insert the name of another company to be substituted as the purchasers);

(c) no first irrevocable option to purchase be granted to the second respondents in the event the general meeting of the applicants did not approve this sale;

(d) any terms accommodating the second respondents' arrangement with their financiers to assist in the purchase of the said land should be deleted, in short, the second respondents were responsible to pay within the stipulated time; and

(e) finally, on the question of Malay reservation, the following were the exact comments:

> 'We are of the view that the restriction does not prohibit our client from dealing with the lands as the lands do not come within the definition of "Malay holdings". As such this provision is to be deleted in toto. The lands are sold with the restriction and in the event that your client is not prepared to purchase the same subject to the same our client proposes that negotiations determine forthwith.'

M/s Soo Thien Ming did not take long to reply, and on 28 January 1994, they insisted that though the applicants were unreasonable on some terms, but 'the main problem is the appearance of the restriction of "Malay reservation"'. Nevertheless, they proceeded to insist that the applicant do 'honour the concluded bargain by our clients' acceptance of the offer, by agreeing to the execution of the formalized sale and purchase agreement upon reasonable terms and conditions'. Obviously, the applicants refused to abide, thus leading to this litigation.

It is the applicants' contention that no agreement was ever concluded between the parties in this case. Besides the issue of the Malay reservation, there were also questions relating to the estate workers and the time limit for payment of the purchase price.

The respondents, particularly the second respondents, on the other hand, argued that since the '3Ps' were agreed upon, there was a concluded contract. Though some other terms were yet to be agreed by the parties, the court could infer reasonable terms into the concluded contract in areas not agreed upon. The '3Ps' referred to by the second respondents' counsel represent 'parties', 'property' and 'price'. According to the second respondents, the parties in this contract had been identified. They were

the applicants as the vendors and the second respondents as the purchasers. In respect of the property to be sold, it was the said land. As for the price, it was the agreed sum of RM30,000 per acre. To support this contention, the Federal Court decision of *Lim Keng Siong & Anor v Yeo Ah Tee* [1983] 2 MLJ 39 was cited.

A careful perusal of the facts of this case reveals that after the offer contained in P8 was made, there was no complete acceptance of all the terms contained therein. Instead, the second respondents concentrated on the issue of the Malay reservation. Other issues, such as the taking over of the estate workers and the time for the payment of the balance of the purchase price, were left in abeyance. It was only after the applicants' reaffirmation of the offer in P8 on 5 November 1993 (after having terminated it earlier on 2 August 1993) that the second respondents immediately accepted all the terms contained therein. Therefore, if at all any agreement can be implied to have been reached, it may only have happened on 20 November 1993, the date when the second respondents' solicitors accepted all the terms in P8 in total. Before this, even the second respondents had in their statutory declaration supporting their entry of the caveats over the said land, declared that the parties were only 'negotiating' for the purchase of the said land.

Immediately upon acceptance of the terms and conditions in P8, the second respondents' solicitors raised the issue of the Malay reservation once again. By their letter dated 28 January 1994, the second respondents seem to have held out this issue as 'the main problem'. With this 'main problem' not being agreed upon, can it be inferred that the parties had reached a concluded contract?

P8 raised no such term and condition relating to the issue of Malay reservation. It was the second respondents who insisted on the settlement of this matter after accepting P8 on 20 November 1993. This subject matter was therefore a new term and condition, though discussed earlier, but that was before P8 was totally accepted by the second respondents. This new term obviously could not be agreed upon by the parties. The applicants had flatly rejected it, while the second respondents did not even consider purchasing the said land with such an endorsement, unless it was removed as a condition precedent. No attempts were contemplated by the second respondents in considering whether the said land could be transferred to them with such an endorsement.

On the issue of the Malay reservation, the applicants' solicitors have explained that the transfer of the said land could be effected to a non-Malay even with such an endorsement. This is for the reason that s 8 of the Malay Reservation Enactment (FMS Cap 142), which is applicable to Negeri Sembilan, Pahang, Perak and the Federal Territories (hereinafter referred to as 'the said Act'), states that 'no Malay holding shall be transferred, charged, leased or otherwise disposed of to any person not being a Malay'. The term 'Malay holding' is interpreted in s 2 of the said Act as 'any registered interest of a Malay as proprietor or co-proprietor in any alienated land included in a Malay Reservation'. This means that in order for s 8 to apply, the land in the Malay reservation must have, first of

A all, a Malay registered proprietor or co-proprietors. If there has been no such Malay registered proprietor or co-proprietors in such a Malay reservation land before, then there should be no prohibition in the transfer of such land to a non-Malay.

This view seems to be similar to that adopted by the Federal Court B in *Tan Hong Chit v Lim Kin Wan* [1964] MLJ 113. It was held in this case that when a piece of land in the Malay reservation area was registered in the name of a non-Malay who had acquired the land prior to the creation of the Malay reservation, the non-Malay could transfer the land to any non-Malay, and any subsequent transfer or charge to a non-Malay could be effected without obtaining the approval of the Ruler-in-Council. Though C the decision in this case was based on the Kelantan Malay Reservation Land Enactment 1930, while our present case involves the Malay Reservation Enactment (FMS Cap 142), it is the opinion of this court that the underlying principle is still the same.

Proceeding from the above, it is also appropriate to highlight the D other reason why the second respondents persisted on insisting on the removal of the endorsement of the Malay reservation from both the register of titles and documents of title to the said land. Under s 6(vi) of the said Act, the registering authority is not permitted to enter any memorial of such nature in the register of titles or on the issue documents of title 'for any land of which the sole proprietor is not a Malay or of which none of E the co-proprietors are Malays' even though the land may be gazetted as Malay reservation. Since, the said land has never been registered in the name of any Malay proprietor or co-proprietor, the memorial so entered on the affected titles is therefore erroneous.

It is the opinion of this court that though this may be so, to insist F upon such an error having to be corrected prior to the completion or made a condition to the sale, is certainly a major term that must be agreed upon by the parties, especially when this involves time, obligations and effort. In addition to this, the imposition of this condition must be viewed in the light that the said land can be transferred and registered in the name of the applicants even with such an endorsement. G

The second respondents strenuously stressed on the fact that, since the salient points were agreed upon by the parties, a substantial agreement had been reached and other reasonable terms in areas not agreed upon could be imported by the courts to make the agreement effective. To support this, the case of *SMIM (Malaysia) Sdn Bhd v Sanyo Murako* H *International Co Ltd* [1992] 1 AMR 42 was cited. In this case, Mahadev Shankar J adopted the principle that once the parties had reached a substantial agreement, a contract was concluded even though some other matters were required to be settled by further negotiations. In respect of such further matters, the court would import reasonable terms in order to I make the agreement effective. Though this may be the legal principle, before it can be applied, a 'substantial agreement' must first be agreed upon. In *SMIM*'s case, the facts pointed towards a substantially concluded contract. There Sanyo Japan, by various documents which included a signed letter of intent and followed by deeds and acts of allowing a local

Malaysian company incorporated solely on the initiative of Sanyo Japan to distribute Sanyo goods in Malaysia for a substantial period of time, decided not to proceed to enter into a formal agreement with the local company. The judge was obviously correct in arriving at the conclusion that a substantially concluded contract was in existence. However, in our case the circumstances are different. The fundamental question relating to title had yet to be agreed or not agreed upon at all. Under this set of situations, can it be said that a substantially concluded contract had been reached?

Again, the earlier cited case of *Lim Keng Siong v Yeo Ah Tee* [1983] 2 MLJ 39, is a case in point, similar to that of *SMIM*. Here, both the vendor and the purchaser had virtually agreed on everything fundamental. It was the vendor's attempt to get out of the agreement that he proposed new terms on insisting that the deposit should be increased to 20% from the original 10%.

In view of the above and after considering all the facts in this case, this court finds that the parties had not reached a concluded contract. Though some salient points were agreed upon, but the fundamental term relating to title of the said land itself was in dispute. The second respondents' counsel may have over-simplified matters by stating that once the '3Ps', ie parties, price and property are agreed upon, a substantial contract is concluded. These symbols in the '3Ps' may represent fundamentals in a contract but, within these and arising from these, are many other equally important and essential terms that must be agreed on before an agreement can be said to be conclusive. This is a sale of a very large estate where the total purchase price involves approximately RM24m. The issues relating to title which also interrelated to the time for payment of the purchase price were fundamental issues which the parties must agree upon before a contract could be considered concluded. In this case, these were not agreed upon by the parties and as such the purported agreement had not crystallized.

This court therefore allows:

(a) a declaration that there was no concluded contract for the sale of the said land between the applicants and second respondents;

(b) a declaration that no commission is payable to the first and third respondents by the applicants;

(c) that the senior assistant registrar of this court do proceed to hold an enquiry into damages (if any) caused by the caveats placed on the said land by the second and third respondents; and

(d) that the respondents do pay the applicants' costs.

Application allowed.

Reported by Sarojah Arianayagam